Onyango & another v Ng'ang'a & another (Commercial Case E333 of 2023)
[2024] KEHC 12557 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E333 OF 2023

PM MULWA, J

OCTOBER 17, 2024

BETWEEN

POLYCARP OTIENO ONYANGO ..... 1ST PLAINTIFF

CATHERINE KATUMBI KIMEU ..... 2ND PLAINTIFF

AND

MARYLYNE WANGECI NG'ANG'A ..... 1ST DEFENDANT

KENYA COMMERCIAL BANK LTD (KCB) ..... 2ND DEFENDANT

RULING

1. This ruling determines two applications filed by the Plaintiffs. The first application is a chamber summons dated 28th July 2023 made under Rule 2 of the *Arbitration Rules* and Section 7 of the *Arbitration Act* seeking interim measures of protection to restrain the 1st Defendant from the threatened sale of Apartment No B7, LR No 1870/V/96, Nairobi (the suit property), pending completion of the sale between the Plaintiffs and the 1st Defendant. It also seeks orders to restrain the 1st Defendant from evicting the Plaintiffs pending the hearing and determination of the arbitration and to restrain the 2nd Defendant bank from intended foreclosure sale pending the completion of the sale.

2. The application is supported by an affidavit sworn by the 1st Plaintiff on 28th July 2023. The grounds are that on 2nd October 2021, the Plaintiffs agreed to purchase the suit property from the 1st Defendant. The completion period was 365 days. Due to the effluxion of time, they revived the agreement through a Deed of Variation dated 29th March 2023 which confirmed that the Plaintiffs had paid Kshs 5,300,000.00 towards the purchase and Kshs 2,000,000.00 as consideration for the deed of variation.

3. From the inception of the Sale Agreement, the Plaintiffs always made the 1st Defendant aware that the balance of the purchase price would be financed by way of a mortgage loan from the 1st Plaintiff's

employer, the Government of Kenya operated through the Housing Finance Co. Ltd (HFC). The Plaintiffs blamed the 1st Defendant for the delayed stamping of the Deed of Variation for stamp duty purposes such that it reached the Plaintiffs on or about 17th April 2023, some 20 days after its execution by the parties.

4. As a result, and while technically the Deed of Variation was dated 29th March 2023, it could not effectively be acted upon by HFC until it was stamped for stamp duty purposes. The approval of the mortgage reached HFC on or about 25th May 2023. HFC issued a letter of offer to the Plaintiffs on 17th July 2023, which was immediately passed on to the 1st Defendant.

5. The 1st Defendant rejected the offer claiming that the Deed of Variation had lapsed. This was despite putting the Plaintiffs through the cost and expense of pursuing the offer from HFC. The 1st Defendant also failed to disclose to the Plaintiffs that on 4th July 2023, she had been given an additional thirty (30) days by the 2nd Defendant bank to conclude the processing of the Deed of the Variation.

6. The Plaintiffs contend that 1st Defendant is seeking to unjustly enrich herself from the Plaintiffs who have paid her sums in excess of Kshs 7,200,000.00 towards the purchase of a property valued at approximately shillings Twenty Million (Kshs 20,000,000.00) only. The 1st Defendant is estopped, debarred and precluded from reneging on the undertaking to proceed as the Plaintiffs have secured the necessary funds to settle the balance of the purchase price.

7. In the meantime, the 2nd Defendant bank has threatened to proceed to auction the suit property unless the 1st Defendant completes the sale within 30 days of 4th July 2023, a fact which the latter hid from the Plaintiffs.

8. It is averred that Clause 18 of the Sale Agreement contains an arbitration agreement covering any dispute between the Plaintiffs and the 1st Defendant. Pending the hearing and determination of the intended arbitration, there is clear and manifest justification for this Court to exercise its jurisdiction and issue the conservatory orders sought to avoid injustice.

1st Defendant's response

9. The 1st Defendant through a replying affidavit sworn on 14th August 2023, deposed that she and the Plaintiffs entered into a Tenancy Agreement dated 26th July 2021 in respect of the suit property by which a consideration of monthly rent of Kshs 90,000.00 payable on or before the 5th day of every month. Thereafter, the Plaintiffs were interested in purchasing the property culminating in the agreement for sale dated 2nd October 2021.

10. Through the agreement, the Plaintiffs undertook but failed to remit to the 2nd Respondent her monthly loan repayment of Kshs 187,739.00 leading to alarming accrual of interest for almost two years. The Deed of Variation was validly terminated as the Plaintiffs failed to complete the sale of Apartment No B-7 within the stipulated timeframe.

11. It is contended that the dispute is the subject of an Arbitration Agreement and that this Court's intervention is limited on deciding whether the interim protection orders sought are merited. That thee Plaintiffs do not deserve the orders sought due to non-payment of rent and non-compliance with the sale terms. The intended sale having been frustrated, there is thus no status quo to be maintained as the applicants neither have any proprietary interests over the suit property nor the right to remain.

2nd Defendant's response

12. The 2nd Defendant bank put in a replying affidavit sworn by its recovery manager, Ferdinand Kalafweri on 26th October 2023. The core depositions were that the bank is not a party to the agreement and therefore not bound by the arbitration clause; that it should be discharged and struck out from the proceedings; that the Plaintiffs do not deserve the grant of the orders for concealment of material facts; that the 1st Defendant charged its property to the bank as security for a mortgage facility of Kshs 12,051,894.00 to be repaid in 13 months; that however, the 1st Defendant defaulted and opted to sell the property by private treaty to the Plaintiffs but the sale did not go through; that the paid portion of the purchase price went towards offsetting the loan but the 1st Defendant did not clear the loan leading to the commencement of the recovery process.

Application dated 24th November 2023

13. The second application is dated 24th November 2023 seeking to have the 1st Defendant committed to civil jail because of an alleged violation of an interim court order issued on 31st July 2023 restraining her from evicting the Plaintiffs from the suit property. The grounds are on the face of the motion, the supporting affidavit sworn by the Plaintiff's counsel, Kyalo Mbobu, EBS and written submissions dated 20th February 2024.

14. The application is opposed by the 1st Defendant through a replying affidavit sworn on 14th December 2023 and written submissions dated 20th February 2024.

Analysis and Determination

15. I have considered the applications, the grounds, the parties' respective affidavits, submissions and authorities. The first issue is whether the Plaintiffs have made a case for the grant of contempt orders against the 1st Defendant and interim measures of protection sought.

16. The Plaintiffs urged that the 1st Defendant should be committed to civil jail for the violation of an interim court order issued on 31st July 2023. On the other hand, the 1st Defendant argued that the interim orders lapsed on 31st October 2023.

17. The record shows that on 31st July 2023, the Court granted an interim order in terms of prayer 2 of the first application until 31st October 2023. It also shows that on 31st October 2023, the matter was taken out as the Court was away on other official duties. It was then slated for a mention on 24th July 2024. Before then, the plaintiffs filed the second application for contempt of court.

18. From my scrutiny of the record, the interim orders lapsed on 31st October 2023, as intended. At no time were the interim orders extended as there was no application for their extension hence the Court did not get an opportunity to consider whether it was appropriate to grant an extension for any sufficient reason. Accordingly, having found that the interim orders lapsed, the second application is rendered moot.

19. The next issue is whether the Plaintiffs have made a case for the grant of the interim measures of protection sought. Section 7 of the *Arbitration Act* on interim measures by the court states:

> "7
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> (1) It is not incompatible with an arbitration agreement for a party, to request from the High Court, before or during arbitral

proceedings, an interim measure of protection for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to this application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

20. The principles for consideration in determining whether to grant interim measures of protection were laid out by the Court of Appeal in the landmark case of *Safaricom Limited v Ocean View Beach Hotel Limited and 2 others* (Civil Application 327 of 2009) [2010] KECA 346 (KLR) (cited in the Plaintiffs' submissions) as follows:

> "Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-
>
> 1. The existence of an arbitration agreement.
> 2. Whether the subject matter of arbitration is under threat.
> 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
> 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision-making power as intended by the parties?"

21. The Court of Appeal went on to state that:

> "A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. This point came up in the famous English arbitration case of *Channel Tunnel Group Limited v Balfour Beatty Construction LTD* (1993) AC 334 where the English Court rendered itself as follows:-
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> > "There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail... If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide."
>
> Although the English Arbitration Act 1996 is not exactly modelled on the Model law unlike our Act, I fully endorse the principles as outlined in the Channel Case (supra) because they are in line with the arbitral tribunal's jurisdiction as set out in section 17 of the *Arbitration Act* of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration."

22. In *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 5 LRC 187, cited with approval in *Alison Jean Louis v Rama Homes Limited* [2020] KEHC 6370 (KLR), it was observed that:-

> " The granting of an interim measure of protection or injunction pending the determination of an arbitral reference was a discretionary measure that should be exercised cautiously so as not to usurp the role of the arbitral tribunal and that it could decline to grant such orders where an arbitration tribunal had concurrent jurisdiction to make such orders. The court should therefore come in under very exceptional circumstances."

23. Turning back to the instant application, it is common ground that the dispute between the Plaintiffs and the 1st Defendant is subject to arbitration as per Clause 19 of the agreement for sale dated 11th October 2021. Therefore, this Court's mandate is limited to determining whether the Plaintiffs have met the threshold for the grant of the interim measures of protection sought.

24. The 1st Defendant submitted that there is no status quo to be maintained as the applicants neither have any proprietary interests over the suit property nor the right to remain there.

She also submitted that termination of a contract does not constitute a subject matter that needs urgent preservation through an interim measure of protection under Section 7 of the *Arbitration Act*.

25. In *Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited* [2013] eKLR, cited in the 1st Defendant's submissions, the Court held that:-

> " Perusal of Section 7 of the *Arbitration Act* clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order from interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference...The issue in dispute between the Plaintiff and the Defendant herein relate to the termination of an agreement between them. Such an agreement cannot be preserved under Section 7 of the *Arbitration Act* as it is not subject matter that is capable of being preserved. It does not present a situation for this court to be satisfied that irreparable loss will result unless the relief was granted. If the court were to grant the orders as sought, it would mean that the court would be preventing one of the parties to the contract from terminating the contract."

(See also *Associated Construction Company (K) Limited v Ministry of Transport, Infrastructure Housing Urban Development Public Works & another* [2021] eKLR).

26. The dispute in this matter relates to the termination of a Deed of Variation in respect of an agreement for sale of the suit property. The Plaintiffs have sought interim orders to restrain the 1st Defendant from evicting them from the premises pending the arbitration and the 2nd Defendant from proceeding from the intended foreclosure sale.

27. I note that the Plaintiffs do not dispute that they have not paid the balance of the purchase price as agreed. I also note that the Plaintiffs do not dispute that they have also not paid up the rent as agreed. As such, the Plaintiffs do not have proprietary interest in the property. Despite this, the Plaintiffs fault the 1st Defendant for terminating the Deed of Variation. To my mind, the legitimacy of the termination of the contract between the Plaintiffs and the 1st Defendant is not an asset or something tangible that

can be preserved under Section 7 of the Arbitration Act. Granting the order sought by the Plaintiffs would mean this Court would be preventing the 1st Defendant from terminating the contract yet this is something that it is entitled to do under the subject contract.

Final disposition

28. In the upshot, the Plaintiffs applications of 28th July 2023 and 24th November 2023 are dismissed with costs for want of merit.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Chamia h/b for Mr. Kyalo Mbobu for plaintiff

Mr. Sharma h/b for Mr. Ng'ang'a for 1st defendant

Ms. Cheruiyot for 2nd defendant

Court Assistant: Carlos